

NGO (Migration) [2017] AATA 2043 (17 October 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Thi Dieu Ngo
VISA APPLICANT:	Mr Van Long Luu
CASE NUMBER:	1618921
DIBP REFERENCE(S):	OSF2015/071317
MEMBER:	Helena Claringbold
DATE:	17 October 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 17 October 2017 at 1:24pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) – Subclass 309 (Spouse (Provisional)) – Provided inconsistent evidence – Evasive and willingness to fabricate evidence – Visa applicant not the spouse of the review applicant

LEGISLATION

Migration Act 1958, s 5F

Migration Regulations 1994, Schedule 2, cl 309.211, cl 309.221, r 1.15A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. On 1 October 2015, Mr Van Long Luu, the visa applicant applied for a Partner (Provisional) (Class UF) visa. The application was made on the basis of his spousal relationship with Mrs Thi Dieu Ngo, the sponsor and review applicant.
2. On 16 September 2016, a delegate of the Minister for Immigration refused to grant the visa. The refusal was made on the basis that the visa applicant did not meet cl.309.211(2) and cl. 309.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations), because the delegate was not satisfied that the visa applicant is the spouse of the review applicant. This is a review of the delegate's decision.
3. On 15 August 2017, the review applicant appeared before the Tribunal to give evidence and present arguments. She provided the Tribunal with a copy of the delegate's decision record. The Tribunal also received oral evidence from Mr Luu. The review applicant was represented in relation to the review by her registered migration agent.
4. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
5. The parties provided inconsistent evidence to the Tribunal; they contradicted their evidence, were evasive in responding to questions and fabricated their evidence to the Tribunal. The parties have not satisfied the Tribunal that they are credible.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The Tribunal has taken into consideration all the evidence in the Department's file OSF2015/071317, folios numbered 1-136, and the Tribunal file 1618921, folios numbered 1-85 and the evidence at the Tribunal hearing.

7. ISSUE

8. The issue in the present case is whether the visa applicant is the spouse of the review applicant as defined in s.5F of the Act.

9. BACKGROUND ON THE EVIDENCE

10. Mr Luu was born in October 1976 in Ha Noi, Vietnam. He is a Vietnamese national. His father is deceased. In 1997, he married Ms Thi Thuy Anh Phan. In October 2013, the visa applicant and Ms Phan divorced. There is one child from this relationship. His mother and seven siblings live in Vietnam.
11. Mrs Ngo was born in April 1985 in Bac Lieu, Vietnam. She is an Australian citizen. In November 2007, she married Mr Thanh Ha Nguyen. In September 2014, the review applicant and Mr Nguyen divorced. Her parents and two siblings live in Vietnam.
12. In April 2013, the parties met in Ho Chi Minh City. On 22 July 2015, the parties married in Ho Chi Minh City.

13. The Tribunal hearing

14. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Is the applicant the spouse of an eligible citizen?

15. The Tribunal is satisfied that the sponsor, at the time of visa application and at the time of decision, was and is an Australian Citizen.

ARE THE PARTIES VALIDLY MARRIED?

16. At the time the visa application was made the applicant provided evidence of her marriage to the sponsor. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE PARTIES IN A SPOUSAL RELATIONSHIP?

17. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

18. FINDINGS

19. On these aspects the Tribunal has considered the evidence before it and is satisfied the facts of this case are as follows:
20. The parties do not have any joint financial assets. At the Tribunal hearing the parties had little insight into their individual financial matters and stated that this was private business and they had not talked about their financial circumstances. While the Tribunal accepts that the parties live in different countries and have not pooled finances, it feels that it is reasonable to expect that as spousal partners, the parties would have some understanding of their individual financial circumstances.
21. Since his divorce in 2013, the visa applicant has lived in his elder brother's home. In 2015, the review applicant claimed to have lived with the visa applicant at his brother's home. The parties provided inconsistent evidence about where they lived, who they lived with and the description of the property they lived in during their time together. This is discussed below in this decision record. While the Tribunal accepts that the parties live in separate countries and have not established a household, it is concerned by the parties' inability to provide consistent information about where and with whom they lived together.
22. The parties claim to have travelled together and to have visited their respective families. Third party statements from friends and family members attest to the parties' genuine and continuing relationship. They state that the parties wedding ceremony was held on 9 July 2015 at a private home; that the parties are recognised by family and friends as being in a spousal relationship. The statements provided have not been accompanied by any verification of the identity of the authors. Even if the Tribunal accepted these statements and photographic evidence of the parties on their wedding day and at different locations together and with others, at face value, because of the significant inconsistent evidence provided by the parties, it is not satisfied that the parties are credible.

23. The parties' claims are as follows, they met in 2013 when the review applicant was visiting her family in Vietnam. They became friends and remained in contact. When the review applicant travelled to Vietnam in January 2014, they met again. In October 2014, she travelled to Vietnam again and the parties spent more time together. At that time the parties travelled to Bac Lieu and Mr Luu was introduced to Mrs Ngo's parents and relatives. In July 2015 the parties held their wedding ceremony and registered their marriage. Although the parties stated that their relationship is genuine they provided significant inconsistent information about the development and progression of their relationship.
24. The Tribunal put information to the review applicant under the relevant provision. The parties were provided additional time to respond to these matters. On 29 August 2017, the review applicant's migration agent provided the following information. "On behalf of the Review Applicant and the Visa Applicant, I would like to thank the Tribunal for allowing additional time in which to provide further submissions. However, I have received advice from Ms. Ngo today that she and her husband, regretfully, have nothing further to add in support of this application". The information put to the review applicant is as follows:
25. The visa applicant provided the following evidence: The review applicant's cousin acted as the parties' matchmaker. In April 2013, the review applicant and her cousin went shopping and asked the visa applicant to join them at a coffee shop. The meeting was arranged and the review applicant's cousin introduced the visa applicant to the review applicant. This evidence was put to the review applicant as it was inconsistent with her evidence that her cousin ran a fast food business and the visa applicant would eat there. When the review applicant went to Vietnam, she visited her cousin's shop and the visa applicant was there and the parties were introduced and their meeting was not arranged but was by chance.
26. In May 2017, the review applicant's cousin stated that she acted as matchmaker for the parties and she invited the visa applicant to join herself and the review applicant. This indicates to the Tribunal that the parties' meeting was arranged and not a chance meeting as told by the review applicant at the Tribunal hearing. Even after considering the review applicant's cousin's statement the Tribunal has serious concerns about the parties' credibility.
27. The visa applicant provided the following evidence: He raised the subject of marriage with the review applicant. The parties went for coffee and he told the review applicant he loved her. On 2 March 2015, he proposed to the review applicant over the telephone and she accepted his proposal. This evidence was put to the review applicant as it was inconsistent with her evidence that on 20 October 2014, at a coffee shop in Vietnam, the visa applicant proposed to her. She stated that she was surprised and happy and agreed. She stated that the parties discussed marriage again on 2 March 2015.
28. The Tribunal would expect that a marriage proposal would be remembered by the parties. In this case the parties do not agree when the marriage proposal was made. The Tribunal is not satisfied that the parties are truthful.
29. The visa applicant provided the following evidence: The first time he met the review applicant's family members was in October 2014. He stated that it was at the review applicant's suggestion he went to meet her family and was introduced to the review applicant's mother, brothers and neighbours. However prior to this and in October 2014, he met the review applicant's mother when he went to the airport to meet his wife and her mother was also there. This evidence was put to the review applicant as it was inconsistent with her evidence that the first time the visa applicant met her family was in October 2014 when she introduced him as her boyfriend to her mother, father and grandmother.

30. In June 2017 the review applicant stated that she went to Vietnam in October 2014 the parties declared their love for each other and travelled to Bac Lieu where she introduced the visa applicant to her family as her boyfriend. Conversely, the review applicant's cousin's stated that when the review applicant returned to Vietnam in late 2014, she welcomed her along with the visa applicant, the visa applicant's mother and two aunts. The Tribunal is perplexed by this conflicting information about when the visa applicant met the review applicant's family. On one hand it is told that the visa applicant met the review applicant's family when he travelled to her home in October 2014. On the other hand it is told that the visa applicant met the review applicant's mother and aunts when they welcomed her. The Tribunal is not satisfied that it can rely on this evidence.
31. The visa applicant provided the following evidence: There were close to one hundred guests at the parties' wedding celebration with ninety five to ninety six guests attending the entire wedding celebration. He said that the review applicant, Loan, her cousin and one or two of her aunts and the visa applicant's siblings, relatives, friends and neighbours attended the wedding celebration. He stated that none of the review applicant's friends attended because she had been in Australia for six to seven years. This evidence was put to the review applicant as it was inconsistent with her evidence that fifty guests attended the parties' wedding celebration. She stated that the review applicant's mother, cousin Loan and her friend Loc attended the parties' wedding celebration. In addition, the Tribunal asked the review applicant, about an invoice the parties provided which recorded ten tables for the parties' wedding celebrations. The review applicant told the Tribunal that in addition to the fifty guests, other people came through the day and other people took food away and it is custom to always order extra.
32. In her statement of May 2017, the review applicant's mother stated that she chaired the parties' wedding ceremony along with the visa applicant's brother. The Tribunal is perplexed that the review applicant's mother is claiming to have had such a prominent role in the parties' wedding ceremony, yet the visa applicant did not provide evidence that the review applicant's mother attended the parties' wedding. Even if it accepted that this was an oversight on the visa applicant's behalf, it is perplexed that the parties could not agree on the number of guests who attended their wedding ceremony and whether the guests remained for entire celebration or whether some were transient. It is also concerned that the review applicant appeared to fabricate a response for the Tribunal to alleviate the inconsistencies in the parties' evidence. The Tribunal is not satisfied that the parties are credible.
33. The visa applicant provided the following evidence: In 2014, the parties lived at his brother's home twice. In June 2015, prior to the parties' wedding the parties stayed at a hotel for two days and prior to this, they had not stayed at a hotel together. After the parties' wedding they began living together at his brother's house. This evidence was put to the review applicant as it was inconsistent with her evidence that in 2014, once the parties decided to get married they began living together. They stayed at one hotel for a few days and then at another place and another hotel and then stayed at the visa applicant's brother's place.
34. The Tribunal has before it a receipt in the parties' names for a hotel stay from 2 August until 3 August 2015. The Tribunal is not satisfied that the parties are credible. They provided inconsistent evidence about when they stayed at a hotel, the visa applicant stating their hotel stay was just prior to their wedding and the review applicant stating they had stayed at several hotels in 2014. Conversely, in June 2017 the review applicant stated that the parties lived as a couple from the day of the parties' marriage in July 2015 until she returned to Australia on 3 August and again from 29 September 2016 to 4 November 2016, for "just over four weeks". Conflicting with this information is the evidence the review applicant gave the Tribunal where she stated that in September 2016, she travelled to be with her maternal grandmother and the visa applicant joined her there when he could get away from work. However in the last few days of the trip she stayed at the visa applicant's brother's home. In

this case the applicant provided inconsistent evidence with each other and the review applicant contradicted her own evidence.

35. The visa applicant provided the following evidence: With regard to the review applicant's registration at his brother's home. He told the Tribunal that he does not understand why the delegate stated that the visa applicant said he didn't understand the household registration rules as he understands the importance of household registration. The Tribunal asked the visa applicant, why the review applicant's household registration was dated May 2017 and not dated at the time of the review applicant's claimed stay being October 2015. The visa applicant then told the Tribunal that he registered the review applicant's stay in his brother's household. He sent the original household registration documents to Australia. The documents were misplaced and he asked for a replacement. This evidence was put to the review applicant as it was inconsistent with her evidence that, the visa applicant's response about household registration to the delegate was because he was anxious and nervous. And later she said to the visa applicant that everyone is required to have temporary household registration for their stay. She stated that the parties didn't provide the household registration information about her temporary stay because she didn't think it was required.
36. The Tribunal does not find the parties to be credible. On one hand the visa applicant is stating that he sent the original household registration for the review applicant to Australia, but they were misplaced. On the other hand the review applicant stated these documents were not provided because she didn't think they were required.
37. The visa applicant provided the following evidence: That the parties lived in his brother's home with his brother and his brother's wife. This evidence was put to the review applicant as it was inconsistent with her evidence that the parties lived in the visa applicant's brother's home with his brother and his brother's wife. In addition a child, who is paralysed and unwell and remained upstairs. The child is assisted by a housemaid who appears to be always in the house and was there when the review applicant got up. However, she is unsure whether the housemaid stays in the house overnight or begins work each morning.
38. The parties' evidence is inconsistent. In this instance they provided different information about who lived in the visa applicant's brother's home when they claimed to have lived there.
39. The visa applicant provided the following evidence: The review applicant returned to Vietnam in September 2016. She stayed for approximately five weeks and for the entire time the parties lived at his brother's home. This evidence was put to the review applicant as it was inconsistent with her evidence that in September 2016, she was going to register for temporary residency at the visa applicant's brother's home. However she went to her home town to be with her maternal grandmother who was ill and the visa applicant joined her there. For the last few days of her trip she stayed at the visa applicant's brother's home.
40. The Tribunal would expect that the parties agree where the review applicant lived during her trip to Vietnam in September 2016. Instead they provided inconsistent evidence about their living circumstances.
41. The visa applicant provided the following evidence: His brother's house is three storeys with two rooms on each floor. This evidence was put to the review applicant as it was inconsistent with her evidence that the upstairs of the visa applicant's brother's home has three bedrooms and downstairs there is a kitchen, a small room and a bathroom near the kitchen.
42. The parties' evidence is that the review applicant lived in the visa applicant's brother's home on several occasions, yet their description of the property is inconsistent.

43. The visa applicant provided the following evidence: He does not have any bank accounts or credit cards. With regard to the review applicant's bank account, the parties respect each other and don't talk about financial matters as yet. This evidence was put to the review applicant as it was inconsistent with her evidence that the visa applicant had a credit card. She has not asked about bank accounts as he had that money before so she didn't ask. However she had two bank account and the parties will open a joint account when the visa applicant comes to Australia.
44. The Tribunal understands that the parties live in different countries and may not have had the opportunity to pool their resources. However the parties lacked knowledge about any aspect relating to financial matters.
45. The visa applicant provided the following evidence: He is studying and working in the brick and granite industry and has been doing this for three months. He is learning the trade from his friends and earns 145 Mil Dong per week. This evidence was put to the review applicant as it was inconsistent with her evidence that the visa applicant began studying in the construction and building industry three to four months ago. His study is at a vocational college in Ho Chi Minh City and is for a period of six months. On completion of this course the visa applicant can go on to study another course. He is also working in the industry but she does not know how much he earns.
46. The Tribunal is told that the parties regularly communicate with each other, however they were unable to provide information they agreed on about the details of the visa applicant's study and employment. The Tribunal is not satisfied that the parties share day-to-day matters.
47. The visa applicant provided the following evidence: The review applicant is working with female friends and colleagues at a nail salon in Orange. She has invested in the business but has not told him how much money she has invested. She only works at the salon in Orange and does not work anywhere else. This evidence was put to the review applicant as it was inconsistent with her evidence that as well as working in the nail salon in Orange she also works in her business partner's salon in Leichhardt. Last week she worked Thursday, Saturday and Sunday in Leichhardt and the other days she worked in Orange.
48. The Tribunal feels that it is reasonable for spousal partners to have knowledge about each other and their employment activities. In this instance the review applicant did not understand or agree with the evidence provided by the review applicant about her usual employment routine.
49. The visa applicant provided the following evidence: The review applicant rents a room and lives with four of her work mates. This evidence was put to the review applicant as it was inconsistent with her evidence that she lives with her business partner and her business partner's daughter.
50. The parties claim to share a spousal relationship and to have been married since July 2015. Yet the visa applicant could not tell the Tribunal about the visa applicant's living accommodation or about whom she lived with.
51. The Tribunal has considered all aspects of the parties' relationship. The Tribunal finds that the parties know each other personally, have socialised in Vietnam and have communicated with each other. However, the Tribunal is not satisfied that the parties are in a genuine spousal relationship. The parties provided significant inconsistent information about their relationship and about their day to day and general matters. The Tribunal is not satisfied on the evidence that the visa applicant and the review applicant are committed to a shared life as spouses to the exclusion of all others.

52. The Tribunal has considered the evidence individually and as a whole. The parties have not satisfied the Tribunal that they are credible. They were evasive and showed a willingness to fabricate evidence. The Tribunal is not satisfied by the parties' oral evidence at hearing that they demonstrate a sound knowledge of each other's lives which is commensurate with a couple in a genuine and ongoing spousal relationship. In respect of whether there is a mutual commitment to a shared life as husband and wife to the exclusion of all others, the Tribunal is not satisfied on the parties' oral evidence as presented at hearing.
53. Given these findings, the Tribunal is not satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship.
54. Therefore the visa applicant does not meet cl.309.211 and cl.309.221.
55. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

56. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Helena Claringbold
Member

57. ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).